

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
VICKY WOOD,

Appellant,

V.

MICHAEL R. BACHMEIER,  
ORVAL O. FLEMING and  
STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondents.

PCHB No. 80-203

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of two orders authorizing permits for the appropriation of surface water, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington (presiding), and Gayle Rothrock, convened at Lacey, Washington on December 18, 1981. Respondent Department of Ecology was represented by Rick Kirkby, Assistant Attorney General. Reporter Lois Fairfield recorded the proceedings.

Respondents, Bachmeier and Fleming through their attorney Odine H.

1 Husemoen informed the Board previous to the hearing they would not  
2 appear at the hearing, but would rest their case on the reports of  
3 examination of the Department of Ecology (DOE). The appellant did not  
4 appear at the hearing and the respondent Department of Ecology in  
5 accordance with WAC 461-08-160(3) moved that the appeal be dismissed  
6 for the failure of the appellant to appear. The appellant not having  
7 requested a continuance or postponement and not having informed the  
8 Board of any reason which would prevent her attendance at the hearing,  
9 the motion was granted. Notwithstanding the granting of the motion,  
10 DOE elected to present evidence for the purpose of establishing a  
11 prima facie case that the subject permits were properly issued.

12 A witness was sworn and testified. Exhibits were examined. From  
13 the testimony heard and exhibits examined, the Board makes these

14 FINDINGS OF FACT

15 I

16 Appellant has appealed the granting by DOE of permit No. S2-25123  
17 to respondent Orval O. Fleming and permit No. S2-25133 to respondent  
18 Michael R. Bachmeier.

19 II

20 The four part criteria for the issuance by DOE of a permit to  
21 appropriate public surface water as set forth in RCW 90.03.290 is:

- 22 1. Water is available for appropriation  
23 2. for a beneficial use  
24 3. and the appropriation will not impair existing  
rights  
25 4. nor be detrimental to the public welfare.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER

1 III

2 This case involves a single surface water source from a single  
3 spring with two almost contiguous points from which water issues. The  
4 spring as a whole is capable of producing about 0.03 cubic feet per  
5 second (cfs) of water. The spring is located in the SE 1/4 of the NE  
6 1/4 of Section 19, T. 7 N., R. 1, W.W.M., Cowlitz County, on land  
7 which belonged to the appellant at the time the permits were applied  
8 for and at the time the permits were issued. At the time of the  
9 hearing, title to the property had passed to Delbert E. and Patricia  
10 Wasson.

11 IV

12 Appellant is the permittee named in permit (No. S2-24957) covering  
13 0.01 cfs and 0.75 acre feet per year from the subject spring with a  
14 priority date of August 17, 1978. The validity of this permit has not  
15 been contested. This permit has first priority on the spring.

16 V

17 A permit granting second priority on the spring has been granted  
18 to Ross Rodenbaugh. The application for the permit was filed on  
19 January 17, 1979, with the approval of the appellant. The application  
20 was for an appropriation of 0.02 cfs. The permit was granted by DOE  
21 on October 23, 1980 for 0.005 cfs and 0.5 acre feet of water, to be  
22 used on the above described property which belonged at the time to  
23 appellant. This permit received the number two priority on the spring.

1 VI

2 On January 25, 1979, respondent Orval O. Fleming filed an  
3 application for 0.01 cfs from the spring (application No. S2-25123).  
4 DOE authorized the granting of a permit to Mr. Fleming for 0.005 cfs  
5 and 0.5 acre feet of water, with the number three priority.

6 VII

7 On January 26, 1979, respondent Michael R. Bachmeier filed an  
8 application for 0.01 cfs from the spring (application No. S2-25133).  
9 DOE authorized the granting of a permit to Mr. Bachmeier for 0.005 cfs  
10 and 0.5 acre feet of water, with the number four priority.

11 VIII

12 Mr. Fleming and Mr. Bachmeier each have an easement for the  
13 operation and maintenance of the spring and for conveying water from  
14 the spring across the property of appellant and her successors in  
15 interest to their own properties. Messrs. Fleming and Bachmeier and  
16 their predecessors in interest have been utilizing the water from the  
17 spring since about 1927 although no water right was ever obtained.  
18 Mr. Rodenbaugh has never appropriated water from the spring.

19 IX

20 The prior water right permits granted to appellant and Ross  
21 Rodenbaugh authorize appropriation of 0.015 cfs. The total capacity  
22 of the spring is about 0.03 cfs, so, about 0.015 cfs continues to be  
23 available for appropriation. Even after the permits granted to  
24 Mr. Fleming and Mr. Bachmeier which total 0.01 cfs are approved by the  
25 Board 0.005 cfs will still remain available for appropriation.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER

X

There is sufficient water available to supply the amount of water authorized to be appropriated under permits No. S2-25123 and No. S2-25133. The water to be appropriated is for a beneficial use. The appropriation will not impair existing prior rights of appellant and Mr. Rodenbaugh and will not be detrimental to public welfare.

XI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

Permit No. S2-25123 and permit No. S2-25133 were issued by DOE in accordance with chapter 90.03 RCW and RCW 90.03.290, and in accordance with RCW 90.54.010 and .020.

II

In this matter the burden of proof is on the appellant to establish that the Department of Ecology erred in issuing permit No. S2-25123 to Mr. Fleming and permit No. S2-25133 to Mr. Bachmeier. Since the appellant did not appear and submitted no evidence, she failed to sustain her burden of proof.

III

The Order of DOE which directed the issuance of the subject permits to respondents Fleming and Bachmeier should be affirmed for two reasons:

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER

1 1. The appeal of appellant has been dismissed for failure to appear  
2 at the hearing.

3 2. DOE has affirmatively shown that the permits were properly issued.

4 IV

5 Any Finding of Fact which should be deemed a Conclusion of Law is  
6 hereby adopted as such.

7 From these Conclusions the Board enters this

8 ORDER

9 The orders of the Department of Ecology authorizing the issuance  
10 of permit No. S2-25123 and permit No. S2-25133 for appropriation of  
11 public surface water are each hereby affirmed.

12 DATED this 31<sup>st</sup> day of December, 1981.

13 POLLUTION CONTROL HEARINGS BOARD

14  
15 Nat W. Washington  
16 NAT W. WASHINGTON, Chairman

17  
18 Gayle Rothrock  
19 GAYLE ROTHROCK, Vice Chairman

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26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER